

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL RELATIONS BOARD  
REGION 2

ATLANTICARE MANAGEMENT, LLC  
d/b/a PUTNAM RIDGE NURSING HOME,

Respondent,

Case No.: 22-CA-177329  
193189  
198370  
206253  
210245

And

1199 SEIU UNITED HEALTH CARE  
WORKERS EAST,

Charging Party.

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**RESPONDENT'S POST HEARING BRIEF**

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## TABLE OF CONTENTS

Preliminary Statement .....	1
Procedural History .....	3
Issues in this Proceeding .....	4
Statement of the Case .....	4
I. The Parties .....	4
A. Putnam Ridge Nursing Home.....	4
B. The Union.....	6
II. Organizing Campaigns .....	6
III. Contract Negotiations .....	7
a. The Initial Bargaining Sessions Focusing On Term and Conditions..	8
b. Bargaining Sessions Shifted to Economic Items At The Union's Requests	
.....	11
IV. Additional Information Requests .....	15
V. Notices.....	16
VI. Catherine Thomas .....	16
Legal Argument .....	18
I. Amendment of the complaint was improper .....	18
II. Putnam Ridge did not have a formal wage policy and employees did not	
receive merit increases every year .....	19
III. The parties reached impasse on an interim wage increase for 2017...	19
IV. Putnam Ridge's personnel actions were consistent	
with its established policies.....	20
V. Catherine Thomas failed to meet the staffing requirements.....	21
VI. Putnam Ridge provided relevant information and the parties	
engaged in meaningful negotiations .....	22
Conclusion.....	27

## **PRELIMINARY STATEMENT**

1199 SEIU United Healthcare Workers East ("1199 SEIU" or "Union") had identified Putnam Ridge Nursing Home ("Employer" or "Putnam Ridge") as a facility it sought to organize. It embarked on two separate campaigns. The first was a failed campaign in 2012 where the Union withdrew its RC Petition after the election date was established. In the second campaign, in November 2015, the Union was successful and the majority of employees voted to be represented by the Union. The two campaigns were markedly similar where no ULP changes were filed. Employees and Putnam Ridge openly expressed their opinions in support for 1199 SEIU and in support for Putnam Ridge. Employees demonstrated in front of the building. Putnam Ridge handed out leaflets which were pro-facility and asking for a vote of confidence.

After the election, Respondent accepted the results and cooperated with the Union. Within three weeks of the Union's request for information, Putnam Ridge provided the employee handbook, payroll information, and the health insurance policy. Putnam Ridge agreed to commence negotiations less than two months after the request for information was made. Putnam Ridge fully cooperated. It agreed to share equally in the expenses for the conference room. It released from work employees to attend the bargaining sessions and subsequently agreed to change the start-times to accommodate the work schedule for the employees.

The facts in this case exhibit a Union who attempted to bully Respondent into agreeing to a contract with unrealistic proposals. Putnam Ridge met with the Union on 13 separate occasions to negotiate an initial collective bargaining agreement. Respondent steadily increased its economic proposal while proposing terms and

conditions which evidence a recognition and respect for the Union. The Union and its representatives, including its counsel, admitted that movement was made by both parties. Ms. Katherine Hansen, the Union's attorney, admitted Putnam Ridge improved its economic proposals.

As discussed below, Putnam Ridge complied with its policies, provided the Union with all relevant information to make a complete contract proposal (which the Union did) and engaged in meaningful negotiations (which the Union did). By all accounts, Respondent stated across the table "everything is negotiable." The Union's actions evidence a clear ability to make an initial proposal and subsequent counter-proposals. Any claim of needing information was debunked by the Union's own actions across the bargaining table. Just because you ask for something does not make it relevant. It is undisputed by this record that the information was not necessary or relevant to engage in meaningful negotiations.

The Complaint in this matter alleges specific and narrow violations. The record evidence fails to demonstrate Respondent committed any of the stated claims. Employees were unencumbered and openly discussed the Union. The only claim of unlawful termination was Ms. Thomas who admitted on direct examination that she was not terminated. Further, Respondent steadily increased its economic proposal at a far greater proportion than the Union. The record evidence demonstrates Putnam Ridge was confronted with contract demands which were excessive and when it objected to these demands and placed reasonable proposals, the Union filed frivolous ULP charges that they needed additional information. Information which the Union by their own actions

demonstrates was unnecessary. The Union attempted to corner Respondent to agree to proposals which were exceedingly excessive from current notes.

Despite the obstacles placed by the Union, Respondent continues to seek a collective bargaining agreement.

### **PROCEDURAL HISTORY**

On June 1, 2016, the Union filed an ULP charge alleging Respondent took unilateral actions without meeting with the Union.

Additional charges were filed subsequently alleging that Respondent violated the NLRB.

On December 22, 2017, Regional Director consolidated Cases and Amended Consolidated Complaint issued a very narrow complaint alleging that Respondent violated the Act and failed to meet with the Union between August 11, 2017 through early December, 2017. ( FP 17 (6) The Complaint also alleged termination of Ms. Thomas --a Per Diem, and posting notices on March 2016 and April 2017 were violations of the National Labor Relations Act. (Formal Papers.)

A five day hearing was held on January 8,9,10,19 and February 5, 2018 before The Honorable Benjamin Green.

On the fourth day of hearing and just prior to the close of General Counsel's case, the General Counsel sought to amend the Complaint to suggest that Employer proposed economic terms which are less favorable than the unit previously received and failing to explain the basis for its proposal. (G.C. 21) The General Counsel also amended requested remedies. The amendment was granted.

## **ISSUES IN THIS PROCEEDING**

Whether General Counsel established that the information requested by the Union was necessary to negotiate a collective bargaining agreement?

Whether the ALJ erred in granting the General Counsel's Motion to Amend the Complaint on the fourth day of the hearing?

Whether General Counsel established that Respondent in the thirteen (13) bargaining sessions where both Parties modified its bargaining positions, failed to negotiate with 1199 SEIU?

Whether the General Counsel established that Respondent was obligated to only improve economic terms for employees?

Whether General Counsel established that Ms. Thomas met the requirements to continue to work as a Per Diem and was terminated?

Whether General Counsel established that Respondent deviated from its established practices by posting two notices as set forth in the Employee handbook?

## **STATEMENT OF THE CASE**

### **I. The Parties**

#### **A. Putnam Ridge Nursing Home**

Putnam Ridge Nursing Home ("Employer", "Putnam Ridge") is a 160 bed long term Facility located in Putnam, New York. It employs approximately 200 employees providing healthcare services to its residents.

Putnam Ridge had a handbook that was revised in February, 2015. The Employee handbook sets forth the policies and procedures at the Facility. (R-1) (Tr. 318) Relevant portions are as follows:

### **DISCRIMINATION BASED HARASSMENT (Pg. 5)**

In addition to sexual harassment, Putnam Ridge will not tolerate harassment which may be based on an individual's race... or any other basis which is prohibited by law.

Behavior, which would result in creating an intimidating, hostile, or offensive work environment or unreasonably interferes with an individual's work performance or has an adverse effect on an individual's work performance will not be tolerated. Violations of this policy will result in disciplinary action up to and including discharge.

Any Employee who believes that he or she has been subjected to discrimination based harassment, should immediately report the matter to their Supervisor, or Department Head, Human Resources or any member of management. Employees can be assured that there will be not retaliation for either filing a complaint or participating in an investigation of discrimination based harassment.

### **EMPLOYMENT CLASSIFICATIONS (Pg.6)**

\* \* \*

#### **Per Diem Employees:**

Employees who are on-call and do not occupy a regularly scheduled staff position of at least 16 hours per week. Per Diem Employees will be called for coverage on an as-needed basis. To maintain Per Diem status, Employees must work a minimum of one week-end a month (if needed) and at least two major holidays a year. (One winter holiday and one several holiday.)

### **INSERVICE EDUCATION (Pg.8)**

Putnam Ridge provides a comprehensive program – of continuing education for all categories of Employees. The goal of this program is to enhance the qualifications of our staff, keeping you informed of the latest developments and techniques in your department.

### **SALARY ADMINISTRATION (Pg. 11)**

A formal program of wage administration has been developed and is used by Putnam Ridge to maintain a fair and equitable relationship in the wages paid for the many types of work performed in the Facility. If Putnam Ridge's goal to maintain wage levels for its Employees that are competitive with those paid for similar work by other Employees in our community. The wage and salary program is reviewed on an annual basis.

### **PERFORMANCE APPRAISALS (Pg. 11)**

Your performance appraisal will be evaluated regularly as a tool to assist you in becoming a more valuable member of our team and to provide you with the feedback that you deserve. A written performance appraisal will be done upon completion of your introductory period and thereafter on an annual basis near your anniversary date. Your department head or supervisor will review the performance appraisal with you and will provide you with an opportunity to discuss any questions you may have regarding any aspect of your employment.

#### **B. The Union**

1199 SEIU United Healthcare Workers East ("1199 SEIU" or "Union") currently represents LPN's, CNA's and traditional service and maintenance employees at Putnam Ridge.

#### **II. Organizing Campaigns**

The Union made at least two attempts to organize the employees at Putnam Ridge. The first attempt, August 31, 2012, the Union filed an RC Petition to seek to represent the CNA's and Putnam Ridge stipulated to the appropriateness of the unit and scheduled an election. (JT EX1) (Tr. 573-74.) The Union engaged in an aggressive campaign to organize Respondent's CNA's. During the first campaign, employees were openly active

in their support for the Union. Ms. Catherine Thomas, a full time CNA at the time, (Tr. 122), was one of a group of 10-20 employees who campaigned outside the facility (Tr. 118.) Ms. Thomas admitted that she and others did not hide their support for the Union. They wore the color purple in support of the Union. (Tr. 121.) Prior to the election date, 1199 SEIU withdrew its RC Petition. No ULP charges were filed against Respondent. (Tr. 576.)

After the Union withdrew its initial RC Petition, Ms. Thomas, in December 2013, changed her employment status from full time to per diem. (Tr. 98.) After becoming per diem, Ms. Thomas admitted she wasn't in the building all that much. (Tr. 108.) Ms. Thomas accepted another job and opted to return to school and reduced her hours at Putnam Ridge. (Tr. 98, 123.)

On November 6, 2015, 1199 SEIU filed a second RC Petition seeking to represent LPNs, CNAs and traditional service and maintenance employees. (JE-2) Again, Respondent stipulated to an election without going to hearing. In the second Union campaign, Respondent presented a non-aggressive, informative campaign. It was not an anti-union campaign but a pro-facility campaign. Respondent had two leaflets and its campaign consisted of requesting the employees to give the Administration a chance. (Tr. 108.) Ms. Thomas testified to a maximum 20 minute meeting with three other CNA's where Rosie Pottinger, the Administrator, asked them to give her another chance. (Tr. 108.) Wendy McTighe testified to a 5 minute conversation where Ms. Pottinger and Eric Greenberger said that they hopes she would do the right thing for the facility. (Tr. 64.) Eric Greenberger never threatened Ms. McTighe at the meeting. (Tr. 80.)

On December 14, 2015, a majority of employees voted to be represented by 1199 SEIU. Again, no ULP charges were filed alleging unlawful misconduct by Respondent. (JE-4)

### **III. Contract Negotiations**

#### **a. The Initial Bargaining Sessions Focusing On Term and Conditions**

Bargaining in good faith is a two-way street. Respondent, entered into the 2016 negotiations with the Union in good faith and with every intention of negotiating an initial collective bargaining agreement which addresses the needs of its facility and its employees. One month after the election, on January 6, 2016, the Union made a request for over thirty (30) specific items. In some instances, the Union requested information dating back over three years.

On January 26, 2016, approximately three (3) weeks after the request, Respondent provided an initial response to the information request (Tr. 178.) Specifically, it provided the Employee handbook, which sets forth the terms and conditions of employment, most current payroll roster, work schedules, total cost to Employer for benefits provided in 2014 and 2015, annual and monthly cost of health insurance plans, and healthcare plans. (JE-14) As recognized by Joseph Chinaea, Vice-president of 1199 SEIU, an experienced negotiator, who served as Chief Spokesperson for the Union, (Tr. 176, 186), the information provided allowed the Union to start in terms of bargaining.

Approximately two (2) months after the Certification of Election, on March 10, 2016, the Parties conducted its first face-to-face negotiation session. (Tr. 186.) This

introductory meeting was attended by a substantial number of employees representative from each department.

Mr. Joseph Chinaea, as Chief Spokesperson for the Union, was present, and David Jasinski who served as Chief Spokesperson and Mr. Eric Greenberger represented Respondent. At this initial meeting, the parties discussed and established ground rules for the negotiations. For instance, as this was the initial collective bargaining agreement, the parties agreed that non-economic items (terms and conditions) would be discussed first. (Tr. 184, 253, 513-14, 590) (JE-18) The parties also agreed to share the cost of the hotel room with each side alternating payment for the conference room. (Tr. 189.) The Union brought a large contingent of employees, children of employees, and outsiders making it unwieldy. The parties agreed that the next negotiations would be set 30-90 days. (JE-18) Mr. Chinaea kept notes of this initial session and he recorded that the parties further agreed that the next negotiations would be set 30-90 days. (JE-18) On June 1, 2016, within the 90 days established by Mr. Chinaea, the parties held its second bargaining session. At this session, consistent with the ground rules, the parties discussed their respective proposals regarding terms and conditions and modified its proposals. The sessions where initially scheduled for 1:00 p.m., but the Union subsequently requested that future negotiations session start at 4:00 p.m. to accommodate employee schedules. (Tr. 187-89.) Respondent agreed.

At the June 1<sup>st</sup> meeting, the Union deviated from its initial agreement and presented a complete contract proposal containing terms and conditions, as well as a full economic proposal. (GC-22) (Tr. 189.) Mr. Chinaea testified that the Union proposed a complete contract submitted to Respondent as part of its proposal. (Tr. 193) The Union

proposed a 6% wage increase in each year of the contract, minimum hire rates of \$15.00 for CNA's and all other service and maintenance job classifications, \$30.00 minimum hire rate for LPN's, longevity pay, shift differentials, participation in and contributions fully paid by the Employees to various funds including SEIU Health Fund Benefits, SEIU pension fund, paid time off provisions, paid holidays, and paid sick days, and vacation pay. (Tr. 189-90, 193.) Nothing prevented the Union from making this complete economic proposal. (Tr. 194.) As discussed herein, the Union's proposals amounted to more than 70% increase in labor costs each year of their proposed 3 year contract.

Consistent with its agreement, Respondent submitted its proposal on terms and conditions only. (GC-23) In it, Respondent proposed Union Security Clause, Dues Check-Off Clause, Seniority Provisions, Grievance and Arbitration Provision and Management Rights (GC-23) Economic items were not provided since the parties agreed to discuss and attempt to resolve terms and conditions prior to the discussion of economics.

The parties continued to meet on a regular basis within the 30-90 days established in the Union initial notes. On June 23, 2016, August 23, 2017 and September 20, 2016, the parties met and reviewed non-economic items. (Tr. 506) On September 16, 2016, Employer sent Notice to the Union reminding the Union that they had Respondent proposal on terms and conditions almost two months before their response. (JE-22.) Both parties made movement on a number of terms and conditions, this included probationary period, seniority, grievance and arbitration provisions. In October of 2016, SEIU's counsel, Katherine Hansen, Esq., became involved in the negotiations. (Tr. 474.) On October 7, 2016, Respondent captured what it believed were tentative agreements on

specific terms and conditions. (G.C. 25.) Employer listed a number of provisions where it believed a tentative agreement was reached. In a letter dated October 13, 2017, the Union responded stating it did not agree with Respondent's accountings of the tentative agreements (Tr. 475.)

b. **Bargaining Sessions Shifted To Economic Items At The Union's Requests**

i. **Initial Sessions dealing with economics**

At the October, 2016 bargaining session, the Union then decided and made a request that the negotiation shift to economics and put aside the outstanding contractual and terms and conditions. Respondent's counsel expressed that the non-economic items had not been resolved; notwithstanding, in a spirit of compromise, Respondent agreed to start negotiating economics. From Fall of 2016 to December 21, 2017, the parties focused on economics. (Tr. 203-04.) At the October 26, 2016 session, Respondent again expressed that what the Union was asking for would cost over 70% increase in labor costs. (Tr. 514, 607) Nothing prevented the Union from making economic proposals or modifying its proposals.

Faced with the demands of the Union's full contract proposal, at the November 28, 2016 bargaining session, Respondent offered a full economic proposal. It included increases to minimum hire rates of \$1.50 per hour, to \$13.00 per hour for CNA's plus regular increases over the term of the contracts amounting to 4%. In addition, Respondent proposed continuation of the same health insurance plan, paid sick days, holidays and vacation. (G.C.-26) Respondent made a proposal with respect to paid time off, wages, and a no frills rate based on specific jobs classification from \$2.50 for LPN's to \$1.25 for Dietary, Housekeeping and Office Personnel. (Tr. 322.) In response, the Union modified

its proposal from 6% to 5.75% in the 3<sup>rd</sup> year of the contract. (Tr. 477, 607.) All other economic provisions remained unchanged in the Union's proposal; this included no change to minimum hire rate of \$15.00 for CNA's and service and maintenance employees. (Tr. 6070.)

The parties continued to meet on a regular basis within the 30-90 days established in the Union initial notes. The next bargaining sessions were January 10 and February 7, 2017. (Tr. 483, 486.) Prior to the January session, Respondent sent a letter proposing a zero to 1.75% increase based on merit for employees in 2017 (Tr. 212, 611.) The Union's response was no change, keep it the way it was in the past, and maintain the status quo. (Tr. 612.) At the January session, the Union's response to Respondent's proposal was short and emphatic. "We are not going to agree in reducing this. We're going to keep it the same." (Tr. 160.) Ms. Hansen stated it should remain the status quo. (Tr. 160.) However, although 3% increases may have been provided in some years and 0% in other years, the Union recognized and admitted the handbook does not guarantee any increases. (Tr. 612-13.)

During the January 10, 2017, after the Union rejected Respondent's proposal for interim increases, various counterproposals were made by each side. The Union decreased to 5.5% across the board (Tr. 487.) Each side moved two times at that session. (Tr. 487-88.)

The Parties engaged in give and take modifying their positions. During the course of remaining contract negotiations, Respondent made proposals with regards to wage increases. (Tr. 207.) It improved the wage increases it proposed at various bargaining sessions (Tr. 207.) Ms. Hansen captured the spirit of the negotiations when she admitted

the Union modified its wage and benefit proposal and Respondent improved its proposal. (Tr. 321-3.)

**ii. The April 5, 2017 Bargaining Session**

The meeting that was to start at 4:00 p.m., had started late. (Tr. 615) At the April 2017 bargaining session, a counter proposal was proposed by Respondent and there was discussions with regards to the Union's proposal and the excessive costs attached to it. (Tr. 206-07, 490.) The Union asked for a recess to meet with its committee to which Respondent agreed. (Tr. 615.) Mr. Greenberger had to leave the bargaining session for a personal commitment and Mr. Jasinski, who was Chief Spokesman for Respondent remained to continue the bargaining session. (Tr. 616.) The Union expressed that they were insulted Mr. Greenberger left and when Mr. Jasinski said he was prepared to continue to negotiate and was here to negotiate, one of the employees at the session called him a "fucking schmuck." (Tr. 617.) At which point, Mr. Jasinski said "I'm not going to sit here and listen to that." (Tr. 617.) He folded up his negotiation binder and said "no one should have to sit here for that." As he walked out, the same employee again, said "you fucking schmuck." (Tr. 617.)

Mr. Jasinski proceeded to document what occurred in a letter to Mr. Chinaea. (JE 7.)

**iii. Continued Bargaining Sessions**

The Union's proposed contract demands were excessive and presented a major obstacle for Respondent to reach an agreement. Specifically, Respondent costing of the Union's contract demands accounted to over 70% increase. (JE-8) Respondent itemized the costs in a memo to Union's counsel dated April 18, 2017. (JE-8)

The parties met on July 13, 2017 and August 7, 2017. As of the end of the August 2017 session, Respondent proposed a 6% increase over the five year agreement. (Tr. 495.) The CNA minimum rate was also raised to \$13.50 per hour and Respondent continued to offer a No-Frills Rate which would raise the hire rate for CNA's to \$15.50 per hour. (Tr. 495.)

At each session, the parties continued a slow movement from its previous positions. As acknowledged by Ms. Hansen, Respondent was open in its position that this was negotiations. (Tr. 535.) Thereafter, the parties did not meet for several months thereafter, for several reasons. The parties have not met during the Jewish holidays which Mr. Greenberger is observant. In addition, Mr. Jasinski was the victim in a horrific car crash. (Tr. 213.) On November 5, 2017, he was struck by a drunk driver with an alcohol content of .24, which was three times over the legal limit at full force. (Tr. 621.) This resulting in him being admitted to the ICU for 5 days and having four cracked ribs, a fractured pelvic bone, and lacerated spleen. (Tr. 621) He was heavily medicated for several weeks, on two crutches, then one, and could not drive for several months. (Tr. 622.)

The Union was well-aware of these injuries and agreed to the adjournment of this trial on one condition:

Ms. Hansen stated:

We understand that you will be requesting an adjournment of the Putnam Ridge trial until January 8. Given the circumstances, the Union will not oppose. However in return, the Union expects that the Employer will agree to a bargaining date between now and the end of the year. (JE-36)

The parties met on December 21<sup>st</sup> and Mr. Jasinski was driven to the session by his son. (Tr. 214, 622.) At that time, the Union proposed and Respondent agreed to a meeting to

review health plan and consider various options including the participation in the Unions healthcare plan. The Union suggested a subcommittee to which Respondent agreed. (Tr. 214-15.)

#### **IV. Additional Information Requests**

On April 19, 2016, the Union requested unit schedules of staffing levels per shift/per unit (JE-19.) Information which was provided to the Union on January 26, 2016.

On August 5, 2016, the Union made another request seeking the following information:

1. Any and all documents setting forth wage increase policies from January 1, 2011 to the present, including all revisions or modifications of such policies;
2. Any and all documents setting forth policies for requesting personal or vacation leave from January 1, 2011 to the present, including all revisions or modifications of such policies

Although Respondent had already provided much of this information which was contained in the Employee handbook as well as payroll records previously provided to the Union (JE-14), Respondent responded on September 16, 2016 (JE-21.)

On October 13, 2016, the Union again requested information. (JE-23) On December 13, 2016, Respondent provided employee increases from 10-1-2011 through 2015, listing names, job titles, rates of pay, wage increases, hire and termination. In addition, gross amount paid for health insurance was provided for years 2014, 2015 and 2016. Overtime hours worked for 2014 and 2015 were also provided (JE-25)

On December 16, 2016, the 2014 cost report was provided to the Union (JE-27)

On April 3, 2017, Respondent, in confirming April 5th bargaining session, Respondent confirmed the production of extensive amount of relevant information which

was provided and requested the Union detail any other information which it needs. (JE-28.)

On April 5, 2017, the Union again asked for information which was previously provided to the Union, including gross payroll for bargaining unit employees. (See JE-14.) Nevertheless, on April 25, 2017, Respondent again provided payroll information and identifying for the Union the per diem designation (JE-30.)

## **V. Notices**

On April 15, 2016, Respondent posted a notice reminding employees that Union business should not be conducted on working time. (JE-5.) In fact, employees openly discussed the Union in the Facility. For Instance, Lorraine O'Connor, admitted employees talk about the Union in the breakroom. (Tr. 57-81.) Up to January 2018, employees openly discussed the Union in the breakrooms. (Tr. 84.) Employees approached Ms. McTighe after each meeting and discuss the Union. (Tr. 86.) Employees have never been disciplined for speaking about the Union. (Tr. 60, 86.)

On April 7, 2017, Administration posted a notice confirming its non-harassment policy in the Facility. (JE-6.) This policy existed before the Union organizing drive and is contained in the Employee handbook. (Resp. Ex. 1.) The policy makes no reference to the Union. (Tr. 89-90.) Respondent reinforces its policy by regularly conducting in service training attended by the employees. (Tr. J2, 88.) The purpose of these in service training sessions by an outside vendor is to prevent harassment in the workplace. (Tr. 52.)

## **VI. Catherine Thomas**

When Ms. Thomas moved out of the area with her family in December, 2013, she secured another full time job as a CNA. At that time, she made a written request to

continue to work per diem (Tr. 98.) She put the request in writing that she wanted to go per diem to put the facility on notice. (Tr. 127.) Respondent, in 2014, agreed to continue to employ Ms. Thomas as per diem without any loss of pay. Ms. Thomas worked one day a week; however, there were times when she did not work because she had taken an extra shift at her full time job (Tr. 123.) She had two days off from her other job and she would work one of those days with Respondent. (Tr. 98.)

In February of 2014 until 2017, she also started to take a resident of Putnam Ridge out privately once a month to do errands. (Tr. 110-11.) The DON had granted permission for Ms. Thompson to take out this resident privately (Tr. 111.)

In January 2015, she started to go to school and Ms. Thomas worked one day every other week. (Tr. 98.) When she worked one day every other week the schedule varied. (Tr. 98.) She would call the scheduler and tell her, what day she had free. (Tr. 98-99.) The amount of advance notice she would give the scheduler could vary, a week, a day, a couple of days. (Tr. 99.) She would sometimes call, sometimes text, or sometimes just tell a co-worker to tell the scheduler (Tr. 99.) Ms. Thomas testified that it was possible that there were times she did not work every other week with Respondent. (Tr.123.)

According to Ms. Thomas, she was told by the Director of Nursing in December of 2015 that a lot of the per diems were not meeting their per diem requirements and that she and Ms. Pottinger were going to have a meeting regarding it. (Tr. 104.) In January of 2016, when Ms. Thomas was at the facility with the resident she took out privately, she stopped by to see the DON and was told the meeting had not occurred yet. The last time Ms. Thompson ever contacted anyone at Putnam Ridge to ask about per diem work was

February or March of 2016 when she left a message for Ms. Pottinger asking the status of the meeting. Ms. Thomas did not put anything in writing asking why she was not being given per diem hours. (Tr. 125.)

## **LEGAL ARGUMENT**

### **I. Amendment of the complaint was improper**

The Complaint “much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance that we to be adjudicated so that he may prepare his case and to set a standard of relevance which shall govern the proceeding at the hearing.” Douds v. International Longshoremen’s Association, 241 F2d 278, 283 (2ndCir.1957)

The Complaint in this matter is narrowly drawn and initially alleged that Respondent between August 11, 2017 through early December 2017 failed to meet at reasonable times and place for bargaining. Thereafter, after Ms. Hansen testified, the General Counsel sought to amend the Complaint and add overall conduct including “providing bargaining proposals which were less favorable that the Unit had prior to selecting the Union.” Surely, such information was available to the General Counsel prior the commencement of the proceeding. Indeed, Ms. Hansen served as counsel to the Union and participated in the negotiation. This was not newly discovered evidence. There was no reason for the complaint to be amended right at the conclusion of General Counsel’s case. No acceptable reason was offered to justify this action and it should be denied.

**II. Putnam Ridge did not have a formal wage policy and employees did not receive merit increases every year**

The Employee handbook served as document which sets forth Respondent's policies and procedures. Ms. Hansen utilized it to become familiar with the policies and procedures prior to her introduction into the contract negotiations. Upon review, Ms. Hansen found (what Mr. China admitted) that Putnam Ridge did not have a formal wage policy. Mr. China recognized that Respondent employee handbook did not provide any guaranteed wage increases. On September 16, 2016, Respondent responded to the Union that there is no formal wage policy at the Facility. (JE-21.) Employees admitted that they had received a zero increase for a number of years. In 2013, employees were informed that they would receive a general increase ranging from \$.50 to \$1.00 based on market conditions. Employees received this increase. (JE-25 see increases.)

In Fall 2015, employees received another wage adjustment based on market conditions. (JE-25)

**III. The parties reached impasse on an interim wage increase for 2017**

On January 5, 2017, Respondent proposed merit wage increases between 0-1.75% for 2017 for employees based on a number of factors including overall work performance for the previous year. (JE-31) Respondent opened this proposal for discussion with the Union. (JE-31)

On January 10, 2017, the parties met for a negotiation session. At the start of the meeting, the parties discussed Respondent's January 6, 2017 letter. The Union demanded no change and maintain the status quo. Ms. Hansen stated that the Union

would never agree to this proposal. The Union had no further comment and the parties returned to traditional negotiations.

The Union never asked to return to Respondent's proposal for wage increases for 2017. The Union's last word was they would never agree to Respondent's proposal. Significantly, the Union never responded to Respondent's proposal in writing which was most uncharacteristic for Ms. Hansen. Ms. Hansen's practice was to respond to everything Respondent did with a written response --- save one, the January 6<sup>th</sup> letter. Faced with the Union's silence coupled with its response of rejection across the table, the parties were at an impasse and Respondent properly implemented its proposal. It did not violate the Act.

#### **IV. Putnam Ridge's personnel actions were consistent with its established policies**

In February 2015, prior to the second Union organizing attempt, Putnam Ridge revised its Employee handbook. It continued, inter alia, Non-Solicitation and Non-Harassment Policies, specific definition of employees, and hours for each classification wage policy and evaluations. Putnam Ridge reinforced its policies with in-service training sessions attended by the employees.

Putnam Ridge continued to comply with these policies and posted two notices. Each one was a notification to employees reminding everyone of the policies and the expectations. There was no obligation to meet with the Union to discuss policies and practices which existed prior to the Union. They were innocuous letters and as evidenced had no impact on the employees. The first memorandum dealt with what is expected of employees at work. (JE-5) The Employee handbook already addressed this situation.

Employee free time is their time. Ms. O'Connor and Ms. McTighe admitted that they discussed the Union in the Facility and no one was ever disciplined. No one testified that they felt inhibited or that there was any chilling effect. Employees, including Ms. Thomas, also engaged in demonstrations outside the Facility with no one being disciplined.

The second letter dealt with harassment in the workplace. Again, a policy which pre-existed the Union and was reinforced with service training sessions prior to the Union. Again, no one was disciplined. The notice served merely as a reminder of the policies.

**V. Catherine Thomas failed to meet the staffing requirements**

Once again, the Employee handbook provided guidance on the policies in the Facility. It specifically established minimum requirements to maintain full-time, part-time and per diem status.

Ms. Thomas started as a full time CNA until she moved out of the area and requested change of her employment status from full-time to per diem. Ms. Thomas opted to accept another full time job closer to her new home. (Tr. 98.) Putnam Ridge essentially became a second job. In December 2013, as a per diem, she worked one day a week. When she decided to return to school, it made her less available for additional hours at her second job with Respondent.

Putnam Ridge accepted her change and continued to employ her as a per diem CNA at the same rate she earned as a full time employee, \$14.68. By her own admission, Ms. Thomas worked less and less hours. She admitted that there were times she did not work for a number of weeks. Her spare time was taken by going to school and engaging in private duty work. Ms. Thomas requested permission to do private duty care for a resident at Putnam Ridge. A request which was granted by the Facility.

Under the policy, per diems were required to commit to one weekend per month. Failure to meet the standard resulted in termination which had been consistently enforced. Since 2011, Putnam Ridge has consistently maintained its policy where 23 CNA's including Ms. Thomas were removed from the per diem ranks. There was no evidence that Ms. Thomas was singled out or targeted or treated any different from the other per diems. Indeed, Ms. Thomas admitted that she has not been terminated by Putnam Ridge. (Tr. 96.)

Ms. Thomas has made no attempt to return to her per diem status as other employees have done. Instead she has chosen to remain in limbo and continue to work full-time for her current employer. The last time Ms. Thomas ever contacted anyone at Putnam Ridge to ask about per diem work was February or March of 2016. Ms. Thomas did not put anything in writing asking why she was not being given per diem hours. (Tr. 125.)

#### **VI. Putnam Ridge provided relevant information and the parties engaged in meaningful negotiations**

From the outset of the negotiations, Putnam Ridge provided the Union with the relevant information to engage in meaningful bargaining.

The information was sufficient to provide the Union with the ability to make a full-contract proposal containing minimum hire rates, wage increases, health benefits, pension plan and traditional terms and conditions of employment.

Thereafter, the Employer continued to respond to Union's information requests and provided request and relevant information. For instance, cost reports were provided, agency usage was provided by Mr. Greenberger, salary and personnel information

including increases were provided by Respondent, affirmation that there is no formal wage policy and other information. At the time of the submission of the full-contract proposal, the Union never claimed that they were hampered in any way or prevented from making a full economic proposal of that they needed any additional information to make a meaningful proposal. To the contrary, the Union placed no conditions on their proposal or, more importantly, negotiating an initial contract.

After four (4) meetings, where the parties made movement and progressed to tentative agreement on a number of terms and conditions including probationary period, the Union maintained its economic proposal containing minimums, yearly wage increases, health benefits, pension, paid holidays, paid sick days, and paid vacation. The Union addressed every economic item traditionally contained in a collective bargaining agreement.

Respondent's initial proposal for terms and conditions demonstrated good faith. It exhibits a party who was interested in moving the contract along and trying to reach an agreement. Putnam Ridge proposed a Union Security Clause and Dues Clock-Off familiar to 1199 SEIU. Likewise, Seniority, Grievance and Arbitration, No Strike, No Lock out were standard clauses. Respondent proposed these clauses to expedite the contract negotiations and get to the substantive issues in the contract-- economics. It demonstrated a clear intent that Putnam Ridge wanted to remove obstacles from reaching a contract. It clearly demonstrates Respondent was not engaging in surface bargaining.

Despite the initial agreement reached by the parties to work toward reaching a tentative agreement on terms and conditions, Respondent relented to the Union's demand to push to the side terms and conditions and negotiate economics, only. From

November 2016 until December 21, 2017, at the Union's request, the parties only discussed economics.

Once again, just like changing the start time for negotiations, sharing the costs for negotiations conference rooms Respondent caved to the Union's request. The Union's demand to negotiate economics only is further evidence that the Union had all of the information necessary to formulate counter-proposals. Respondent repeatedly conveyed to the Union the problem with the Union's economic proposals – they were unrealistic. The cost of the Union's contract was a 70% increase in labor costs. The Union proposed its Master Agreement. This Facility could not absorb the Union proposal. Nevertheless, Respondent made a full-proposal which contained an increase in minimums for CNA's from \$11.50 to \$13.00 per hour and this amounts to an 11% increase for many CNA's (see JE-24), plus wage increases totaling 4% over the term of the contract, the same contributions to Putnam Ridge's Healthcare Plan they currently make and paid time off benefits.

The Union's response was to make a minor change to adjust its economic proposal from 6-6-6% to 6-6-5.75%. A reduction of .25% in the 3<sup>rd</sup> year of the contract --- all other economic provisions remained unchanged for all service and maintenance employees. The contributions to the Funds and \$15.00 minimums were unchanged.

Significantly, the Union never claimed that they could not negotiate or were prevented from making a counter-proposal. The Union was interested in continuing to negotiate – which Respondent did. At the next session, January 10, 2017, Respondent continued to improve on its economic proposal. At the following session, the Union withdrew contributions to the minor funds amounting to 1 ½%. They also reduced its wage

increases by another .25%. However the substantive economic proposals including increased minimums, wage increases, contributions to health and pension funds and PTO received the same.

In each succeeding session, Putnam Ridge continued to improve its economic offer. The Union, on the other hand, reduced their proposal by a smaller percentage of its overall cost to Respondent. Specifically, the Union has never modified its proposals to reduce minimum rates for CNA's or other service and maintenance employees. While the Union made minor changes on general increases, they continued to demand new minimums of \$15.00 which guaranteed employees would receive more than the general increase. Simply stated, their reduction of general increase was no reduction in the total costs. Certain service and maintenance classifications make \$10.00 per hour. Under the Union's proposal to \$15.00, that represents a \$5.00 per hour increase or 50% for each employee. The Union continued to propose pension contributions of over 11%. This would amount to over \$300,000 per year or \$900,000 in 3-year collective bargaining agreement added to Employer's costs. These numbers do not include the wage increases of 5% each year and increased cost of health insurance.

Putnam Ridge consistently questioned the Union's proposal and backed up the costs in a memo detailing the increases. Despite the detailed explanation, the Union refused to modify its proposal and only backed Respondent into a corner.

On November 5, 2017 a serious injury hospitalized Employer's chief spokesperson and prevented his return to work. The Union recognized the seriousness of the injury and requested a meeting before the end of the year. The Union essentially gave Respondent a pass.

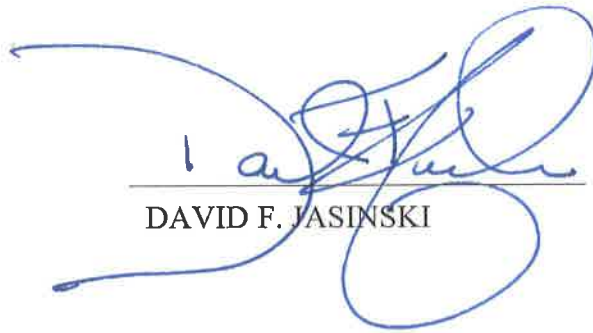
On December 21<sup>st</sup>, despite the Union's demand for bargaining, the Union never made a counter-proposal. Instead, the Union asked to have a committee meeting to explore alternate health insurance programs. Specifically, the Union wanted a forum to demonstrate the value of the Union's Health Plan. Respondent agreed.

Throughout these negotiations, Respondent met the timelines which were acceptable to the Union meeting within 30-90 days. As Ms. Hansen admitted Respondent exhibited movement and improved its proposals --- she had no choice because it was obvious. The Union on the other hand changed ever so slightly its proposals. The labor costs proposed by the Union were exorbitant for any employer let alone as initial collective bargaining agreement.

If any party was not bargaining in good faith—it was the Union. The facts exhibit an employer who attempted to work with the Union to reach an initial collective bargaining agreement and is still willing to do so.

### CONCLUSION

For the foregoing reasons, Respondent respectfully urges the Administrative Law Judge to dismiss the complaints against Respondent in its entirety and with prejudice.



DAVID F. JASINSKI

**CERTIFICATION OF SERVICE**

The undersigned certifies that on April 18, 2018, he caused a true and accurate copy of the foregoing brief to be served upon on the following individuals via electronic mail:

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